

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

UNITED STATES OF AMERICA \* CRIMINAL NO. H-21-9  
\*  
VERSUS \* Houston, Texas  
\* July 29, 2021  
ROBERT T. BROCKMAN \* 10:50 a.m.

STATUS CONFERENCE  
BEFORE THE HONORABLE GEORGE C. HANKS, JR.  
UNITED STATES DISTRICT JUDGE

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1 THE COURT: The next case on the Court's docket this  
2 morning is Cause No. CR-4-21-9, the United States of America  
3 versus Mr. Robert E. Brockman.

4 Can counsel just introduce themselves to the  
5 Court and state the parties they represent starting with the  
6 government.

7 MR. MAGNANI: Thank you. Good morning, Your Honor.  
8 Christopher Magnani for the United States. And I am joined  
9 by Special Agent Ted Laird of IRS criminal investigations.  
10 And I believe my colleagues Corey Smith and Lee Langston are  
11 appearing from Washington, DC by Zoom.

12 MR. SMITH: Good morning, Your Honor. Corey Smith  
13 for the government.

14 THE COURT: Good morning, Mr. Smith.

15 And who is the other one, counsel?

16 MR. MAGNANI: Lee Langston. But I am not sure if he  
17 is making an appearance, but I think he is appearing as well.

18 THE COURT: I see his name pop up. Welcome.

19 MR. VARNADO: Good morning, Your Honor. Jason  
20 Varnado with my colleague James Loonam and Kathryn Keneally  
21 on behalf of Mr. Brockman, and Mr. Brockman is here and  
22 present as well.

23 THE COURT: Good morning everyone. Good morning,  
24 Mr. Brockman.

25 THE DEFENDANT: Good morning.

1 THE COURT: We are here this morning for a status  
2 report in this matter. And I appreciate the letter, the  
3 joint letter, or I guess Mr. Brockman's counsel sent the  
4 letter; but I am sure that all of you have probably seen the  
5 letter telling me the status of where we are in this case  
6 and what needs to be done.

7 The first thing I wanted to talk to you about  
8 was the request for the extension of time. Is that all ready  
9 for the Court to rule on or have the parties reached any  
10 agreement on that?

11 MR. VARNADO: Your Honor, again Jason Varnado for  
12 Mr. Brockman. The parties have not reached an agreement on  
13 that. I think first and foremost what we are here on is our  
14 letter motion just docketed, No. 73, where we are seeking an  
15 extension of the deadline, including the competency hearing  
16 deadline, based upon some medical issues that Mr. Brockman  
17 has suffered, frankly, since the government has conducted  
18 their psychiatric examinations on Mr. Brockman.

19 THE COURT: Can I hear from the government with  
20 respect to that? Are you all prepared to take up that issue  
21 this morning?

22 MR. MAGNANI: Yes, Your Honor. We are prepared to  
23 take up the issue this morning.

24 THE COURT: Okay. Then let me hear from Mr. Varnado  
25 and then I will hear from the government.

1 MR. VARNADO: Thank you, Your Honor.

2 Your Honor, there are actually multiple reasons  
3 now for a continuance of the competency hearing deadlines.

4 I will start with the health reasons, which is  
5 why we filed the letter motion in the first instance. And if  
6 I could, I hand up to the Court a docket that details some of  
7 the back and forth with the government, the competency  
8 testing and some of the events that Mr. Brockman has suffered  
9 over the last several moment.

10 THE COURT: Okay. If you can hand it to my law  
11 clerk.

12 MR. VARNADO: Let me just guide the discussion  
13 somewhat, Your Honor, as we go through this today.

14 Really the gravamen of the defendant's request  
15 for a continuance is that after, again, earlier this Spring  
16 in March of 2021 Mr. Brockman was hospitalized with a urinary  
17 track infection as well as sepsis, which had reached his  
18 brain, a very serious condition. Despite that, again, Mr.  
19 Brockman submitted to a sleep study. Mr. Brockman and his  
20 spouse submitted to interviews by the government's expert,  
21 Dr. Darby, the court-appointed expert neurologist. And then  
22 Mr. Brockman also submitted to several days of interviews and  
23 testing by two other court-appointed experts, Dr. Dietz and  
24 Dr. Denney. He also voluntarily produced medical records.

25 But then at the end of May and beginning of

1 June, for nearly a two-week period, Mr. Brockman was  
2 hospitalized at Houston Methodist and treated again for the  
3 UTI condition and a serious sepsis condition that was life  
4 threatening.

5 After that period of time Mr. Brockman's  
6 counsel submitted to interviews by court-appointed expert Dr.  
7 Denney. Both Ms. Keneally and Mr. Romatowski did that.

8 And then most recently Mr. Brockman underwent  
9 what we understand under general anesthesia, a surgical  
10 procedure hopefully that hopefully will eliminate the risk of  
11 any future infections and hopefully sepsis episodes.

12 And so with that backdrop, Judge, defense is  
13 concerned, given the recency of these two most recent  
14 hospitalizations, that any testing that defense experts would  
15 want to do of the defendant's competency would be subject to  
16 criticism from the government or the court-appointed experts  
17 that those results were somehow flawed; and we had sought an  
18 extension of the deadlines, in light of these health  
19 episodes, to ensure that that criticism could not be alleged.

20 The government acknowledged that the test could  
21 potentially be subject to such criticism, but nevertheless  
22 refused a continuance. That's what led to us file the letter  
23 motion seeking extension of the deadlines.

24 Now I am going to talk about some additional  
25 reasons before I turn it over to Mr. Magnani.

1                   There is also now, in the intervening time  
2 since we submitted the letter motion, it's clear that the  
3 government has not turned over certain test results and raw  
4 notes that the court-appointed experts have relied up that  
5 our defense experts would need in order to perform their  
6 work; and under the current schedule, the deadline is August  
7 6th for defense expert reports.

8                   There is also now the scheduled sleep study.  
9 There was an initial sleep study that you can see from the  
10 chart, Your Honor, performed on April 29th. The results of  
11 that study were insufficient, given an undiagnosed sleep  
12 condition suffered by Mr. Brockman; and so there is now  
13 another sleep study scheduled for August 12, which is after  
14 the time period in which the defendant's expert reports are  
15 due. So that's just further justification I think more to  
16 the records that we're waiting on.

17                   But those are really three issues that we  
18 think, in addition to some others that I will talk about with  
19 respect to our motion to compel. But with respect to the  
20 letter motion and the health conditions, that's what we  
21 wanted to set forth today.

22                   THE COURT: Okay. Well, before the government  
23 speaks, the question I had when I was reading all this was  
24 that I was trying figure out how -- and I am not a doctor, of  
25 course -- but how the physical issues affected the mental

1 competency evaluation. I know that physical issues can cause  
2 stress and that sort of thing; but, I mean, kind of walk me  
3 through how the physical ailment affects any competency  
4 analysis.

5 MR. VARNADO: And I think even the court-appointed  
6 experts would acknowledge that there is a deprivation and a  
7 degradation of his baseline functioning because of these very  
8 serious hospitalizations.

9 So in the second hospital episode he suffered  
10 bouts of delirium that was treated with an antipsychotic  
11 mediation. Again, with the sepsis reaching the brain, a  
12 potentially life threatening situation that his treating  
13 physicians and our medical experts say does in fact affect  
14 the initial cognitive ability, which even the court-appointed  
15 experts have acknowledged, he does have diminished cognitive  
16 ability, they will even acknowledge that, after these  
17 episodes, and even more pronounced.

18 So we are requesting some amount of time, and  
19 our experts say 60 days would be an appropriate amount of  
20 time, to try to get to a baseline from which he can do the  
21 testing that needs to be done that would not be subject to  
22 criticism. Because they were so close it would be very  
23 serious and significant health episodes that did involve,  
24 again, sepsis reaching Mr. Brockman's brain.

25 THE COURT: Are your experts pretty confidential

1 that in 60 days he is going to have a baseline? Because as I  
2 am a not I am not a doctor, the other thing I was concerned  
3 about is what's the baseline now? If the tests were  
4 performed, if there were tests done, competency tests done or  
5 some tests done or these conditions -- well, let me wait.  
6 Hold on that thought.

7 Let me ask the government, and I will get back  
8 to you, because I am just trying to figure out what the  
9 baseline is and how we are going to determine what the  
10 baseline is given these conditions that Mr. Brockman has. So  
11 let me ask the government to speak.

12 MR. MAGNANI: Thank you, Your Honor.

13 Just preliminarily, the government is sort of  
14 in the dark on a lot of these things. We do not have a  
15 medical record of these recent hospitalizations. And  
16 although we requested it of the defense, I still don't know  
17 whether the defense is even in a position to meet their  
18 deadline.

19 When they first asked for this continuance and  
20 we said that we would agree to this hearing but that we would  
21 not agree to the continuance, we suggested to them that they  
22 proceed as if the deadlines that we all agreed to would be  
23 met.

24 And so, I am not sure today if they are  
25 prepared to do that or if essentially they're in a game of



1 chicken with the Court of, well, we haven't moved, because  
2 Mr. Brockman has been out from his second hospitalization  
3 since June 11th, so he got out on June 11th, and he went in  
4 on May 30th, according to the defense letter. This document  
5 says the 31st, but the letter that they filed said the 30th.  
6 And, frankly, I don't know because I don't have these  
7 records. But he went in the 30th. They didn't ask for a  
8 continuance then. They didn't for it when he got out on the  
9 11th. They waited until after our expert reports were due on  
10 the 21st.

11               They got this report, they sat on it and then  
12 they asked for the continuance. And the continuance, Your  
13 Honor, is not based on anything. It's not based on anything  
14 other than speculation that's close in time to this  
15 hospitalization and exams may be subject to some baseline  
16 problems. But it's not based on a doctor actually meeting  
17 with the defendant and saying, wow, you know, he's really  
18 still having some problems with his hospitalization. I can't  
19 do a reliable exam at this point. It's not based on that.  
20 And I don't know if they have done anything since then.

21               So when they asked for the continuance, I  
22 called our doctors and I said, hey, what do you think? He's  
23 getting out of the hospital -- by the time they asked he had  
24 already been out of the hospital about two weeks. So I asked  
25 the doctors designated by the Court, I said, you know, two

1 weeks, is that first day not valid? They said, of course  
2 not, of course it's not, the first day. And we have no  
3 access to the patient. We can't see him. We can't see the  
4 records, but there is no first day reason. And so that was  
5 almost a month ago now. And I don't know what they have done  
6 in the intervening month to ensure that they can meet the  
7 deadline.

8                   So, from my perspective, Your Honor, this just  
9 seems like a little bit of gamesmanship because although  
10 their claim is that, well, if we do the test too soon, the  
11 government will not promise not to attack the validity of the  
12 test. But if you continue this case, then the reports that  
13 were done by the experts designated by this Court are just  
14 going to get more and more stale.

15                   So this is sort of a moving thing, and there is  
16 a very good reason for the Court to expeditiously handle  
17 this. This issue has already put off this case for a very  
18 long time, and my concern is that it's going to continue to  
19 put it off; and we don't know what future medical things  
20 might contain.

21                   What the defense described as an accommodation  
22 to the government in its letter was nothing of the sort at  
23 all. The first change in the schedule was in the letter they  
24 mentioned a 45-day continuance. It was a  
25 two-and-a-half-month continuance. It was a 45-day

1 continuance for the government's deadline, but the defense  
2 put in another month for their expert reports. So calling  
3 that an accomodation -- and by the way, Your Honor, it was  
4 based on representations made on the docket to this Court  
5 from a defense-filed motion that continuing on the proposed  
6 schedule, on the current schedule at this time would be not  
7 humane. Those are the words in their filed motion asking for  
8 the continuance.

9               So, the government is trying to move this case  
10 along, Your Honor, and it's concerned that, one, that this is  
11 just gamesmanship. Waiting for the expert reports from the  
12 government to come in before asking for this, even though the  
13 hospitalization happened weeks before, that's not a good  
14 date.

15              And secondly, just because of the nature of  
16 this moving and constantly evolving situation, the  
17 government, the experts that the government has retained and  
18 hired to do these very intensive deep-dive examinations in  
19 May, those are now just going to be half a year old by the  
20 time we get to an eventual hearing.

21              But I think the government's main point is that  
22 this is just really based on nothing but speculation. The  
23 defense has not, at least to my knowledge, had someone look  
24 at, had an expert look at defendant and say I can't do an  
25 evaluation because the baseline is messed up. It's just

1 based on their theory that it's potentially subject to some  
2 sort of criticism.

3 And so, whether that potential is real or not  
4 could be ameliorated if the defense agreed to one of the  
5 things that we've asked for, which is that their exam be  
6 subject to the same video reporting requirements as the  
7 government's exam. And then that way, if it subject to  
8 criticism, it won't be for some hypothetical reason.

9 THE COURT: Oh, can we just move the mic a little  
10 bit closer to you. I just needed to make sure we made the  
11 record.

12 MR. MAGNANI: Okay.

13 The government has requested that any expert  
14 evaluations that the defendant conducts to sort of rebut the  
15 government experts' evaluations, that they be subject to the  
16 same video recording requirements of the government exams.  
17 And the reason for that is that if those exams are subject to  
18 criticism or if the defendant is not in any appropriate state  
19 to be evaluated, at least it will be objectively criticized  
20 on the merits as opposed to based on this hypothetical, our  
21 doctors don't know anything, and would they say it's too  
22 close in time to the hospitalization. But that's all moot at  
23 this point because the hospitalization was almost two months  
24 ago.

25 And the final thing that I will say, Your

1 Honor, is I gathered the schedules of all the different  
2 prosecutors and doctors, and this is going to be very hard to  
3 continue. We've had this schedule for a long time, and a lot  
4 of people are depending on it. And so one of the things I  
5 just want to sort of put out in the air is that another  
6 possibility would be to keep the current date but to give the  
7 defendant a little bit more time to write his reports.

8               So, No. 1, the government's position is this  
9 request should be denied. But No. 2, even if some leave is  
10 granted to give the defense a little bit more time to write  
11 their reports, the government would be willing to have less  
12 time for ourselves and our experts to review those reports if  
13 it means we can keep the date that we all agreed to a long  
14 time ago.

15               THE COURT: Thank you, counsel. And your counsel  
16 highlighted the argument or the concern that I have in his  
17 argument, highlighted the concern I have, counsel, which is,  
18 I have nothing before me that says that these  
19 hospitalizations or this treatment is somehow going to affect  
20 the competency evaluation. I mean, you said that their  
21 experts agree to it. Listening to the government, the  
22 government's not agreeing to that. Their experts clearly, it  
23 sounds like their experts don't even know what to think  
24 because they don't have any records to look at.

25               So how do I, as the Court, determine that this

1 medical treatment in any way affects the competency  
2 evaluation?

3 MR. VARNADO: And, Your Honor, I am going to go back  
4 and check the records for the declaration submitted. And  
5 with respect to the very first, the first continuance Mr.  
6 Magnani referenced, which was agreed upon, so that extended  
7 the deadline.

8 THE COURT: Right. But that was then. This is now.

9 I mean, before we had the conditions and I had  
10 looked at it and everybody agreed we're going to put this off  
11 to make sure that Mr. Brockman is in good enough shape for  
12 the competency hearing.

13 This is something totally different now. This  
14 isn't the same. Now there is all these other procedures that  
15 are allegedly taking place that are causing all these  
16 problems. So I need to know how these procedures affect his  
17 competency, not what his previous treatment did or would  
18 affect his competency, but this treatment.

19 MR. VARNADO: And I definitely want to answer that  
20 question, Judge, and be real clear that the second episode of  
21 a urinary track infection with sepsis accompanied by delirium  
22 was really a recurrence of what happened in March. So it is  
23 the same type of medical condition that the parties agreed  
24 would be justification for pushing the schedule.

25 THE COURT: Let me stop one second.

1                   Have you provided the government with those  
2 medical records to evaluate the seriousness of what happened  
3 so that their experts can say, yes, this is the same  
4 situation or it's different or it's more serious or not  
5 serious? I mean --

6                   MR. VARNADO: We have sought those medical records.  
7 We have also given HIPAA waivers to the government to obtain  
8 any medical records they want, frankly. And so we have  
9 sought some of those hospitalization records, but we have  
10 represented to them what the medical professionals have told  
11 us about Mr. Brockman's second hospitalization.

12                   He was released on June 11th. What Mr. Magnani  
13 is ignoring is that he actually underwent surgery two weeks  
14 later, that was June 24th, hospitalized over that night to  
15 the 25th under general anesthesia.

16                   THE COURT: But the problem is, I don't know what  
17 that was about. I mean, there is a lot of things he can get  
18 general anesthesia for that don't require, that don't relate  
19 to competency. A colonoscopy is under anesthesia. That's  
20 not going to affect my ability to stand for competency.

21                   So, I don't mean to interrupt, but I guess the  
22 key one I am asking is, have all of these records, have you  
23 guys gotten together and exchanged these records or provided  
24 all of these records so that everybody is talking apples to  
25 apples rather than apples and oranges?

1 I mean, you're saying these conditions are bad,  
2 these surgeries are bad, it's affecting his competency. The  
3 government is saying, we don't have any records. We don't  
4 know how bad it is. We don't even know what procedures were  
5 actually done other than to help prevent UTIs and bacterial  
6 infections.

7 What I need to know is have you guys sat down  
8 together and talked about or exchanged medical records so  
9 that you are all talking on the same page? And more  
10 importantly, have you exchanged the medical records and have  
11 your experts looked at the medical records? Because the key  
12 to this resolution of this dispute is, when your experts,  
13 government, looks at them, is your experts going to look at  
14 these medical records and say, well, yeah, these kinds of  
15 treatment, this kind of illness is going to affect his  
16 competency proceeding, because you don't have anything so far  
17 from your expert saying that it would.

18 So to me the easiest thing for you to do is you  
19 got to sit down, completely exchange the medical records, I  
20 mean, all the medical records. And you get a report from  
21 your doctor saying either these conditions or this, based on  
22 my review of the medical records, it would affect the  
23 competency hearing, or it would not, or I can't tell because  
24 I need to do further examination.

25 You need to provide an expert report that says



1 these proceedings, these medical treatments would affect the  
2 competency proceeding. Get that back to me and then we can  
3 have a hearing on this, because I can't just decide this  
4 issue sort of out of nothing based on just arguments that --  
5 I mean, all I know now is there were procedures, they sound  
6 serious, but none of the experts have looked at the medical  
7 records, none of the experts have been able to evaluate  
8 whether or not these procedures would or would not affect the  
9 competency hearing.

10                   And the other thing the Court is concerned  
11 about is to a lesser extent I just don't know the timing. I  
12 mean, the government has a good point that this issue is  
13 coming up after he has already been treated. Well, this  
14 issues is coming up after the expert reports of the  
15 government have already been done in this matter. And it  
16 looks like there is a lot of treatment for very serious  
17 conditions before that report was done.

18                   So, the bottom line is, I am not going to rule  
19 on this. What I am ordering the parties to do is I want you  
20 to sit down. If you want to extend the deadlines, then you  
21 need to make sure that the government has all the medical  
22 records in order to evaluate the condition, and then you guys  
23 need to provide me with an expert report, not argument of  
24 counsel, but I need an expert report from the government and  
25 an expert report from Mr. Brockman stating that because of

1 this condition, this condition, these treatments, it would  
2 affect a baseline or not affect a baseline for a competency  
3 hearing and why. And then I can look at that and, you know,  
4 okay, yes or no, because right now all I am hearing is  
5 argument of the parties. I have got, quite frankly, no  
6 expert's medical opinion to be able to base a ruling on, and  
7 I am not a doctor. I can't tell.

8 And as I said, just because you have a general  
9 anesthesia doesn't mean that it's going to affect my  
10 competency, a competency hearing or a competency evaluation.  
11 That doesn't really tell me anything.

12 I do get that if you have sepsis accompanied by  
13 delirium, but just because you're delirious doesn't mean that  
14 three weeks would affect July, I mean, June, don't mean that  
15 basically six weeks later after delirium is gone I am not  
16 suited to have a competency hearing.

17 So, I just think you guys need to exchange the  
18 information and get me expert reports and then I will rule.

19 MR. VARNADO: Your Honor, that is the reason why as  
20 soon as the -- and we mentioned the surgical procedure in  
21 part because that's meant to remedy the UTI so that that  
22 doesn't occur and so we're not just in a perpetual state. No  
23 one is interested in that. And we provided this information,  
24 so we have not been dragging our feet or pushing things off,  
25 and Mr. Brockman has subjected himself to PET scans, food

1 study, days and days of examination by the court-appointed  
2 experts.

3               This is intended to ensure that the government  
4 is not going to criticize any test results from the defense  
5 because they were conducted too soon in time to these  
6 episodes. And we did file the motion five days after he was  
7 released from the hospital for the surgery that hopefully  
8 resolves these issues so they're not recurring. But the  
9 Court's order is understood, and we will get the records.

10              I would say under the current schedule the  
11 defendant's reports are due on August 6th; and that's going  
12 to be a challenge to get those reports to, medical reports to  
13 the government and to our experts. Given the report you  
14 need, I do think there will be some need to continue the  
15 deadlines in this case.

16              In addition to the health reasons, there are  
17 other reasons, including documents that we're still waiting  
18 on from the government for our experts to be able to analyze  
19 to complete their work, which includes, again, raw notes that  
20 were relied upon by the court-appointed experts that include  
21 notes of interviews of Mr. Brockman and his spouse that they  
22 submitted to that the government has to date refused to turn  
23 over.

24              And I also just mentioned the sleep study,  
25 which the government's position is that this is one of the

1 key objective measures that's relevant to the competency  
2 examination that's now set for August 12th, which is closely  
3 to the date of the reports. So I just want to mention that  
4 in terms of timing for the Court.

5 THE COURT: Okay.

6 Anything from the government?

7 MR. MAGNANI: Only to say, Your Honor -- well, I  
8 guess a couple of things. One is, of course, any delay in  
9 this case just inures to the defendant's benefit. He's out  
10 on bond in this case, and he's delayed this by a very long  
11 time.

12 And although Your Honor has mentioned that you  
13 heard a lot of arguments and you'd like to see evidence,  
14 there is a mountain of evidence on the docket in this case to  
15 support the contention that he's a malingerer; and the Court  
16 shouldn't blind itself to that. A lot of this stuff is very,  
17 very objective evidence.

18 And so the government would point to a few of  
19 them; but before I even do, I just want to say that we asked  
20 the defense for medical records, because the Court's  
21 suggestion is a very good one: Why don't you guys share the  
22 records and come to an agreement?

23 Well, here's the reason we can't. After the  
24 defense raised this issue but before they even filed their  
25 motion for a competency hearing, we sent them a letter that

1 said, hey, can you guys please send us all your medical  
2 records? And their position was, you have everything,  
3 everything is in the public docket. That's all we have.

4 THE COURT: Well, it can't be in the public docket.  
5 There is no way.

6 MR. VARNADO: That's not what we said, Your Honor.

7 MR. MAGNANI: Okay. So that's my representation of  
8 what they said, but it's in a letter, that's the good news.

9 But here's what I can tell you. Until their  
10 client met with one of the court-designated doctors and told  
11 that designated doctor that he had bankers boxes of records  
12 in his home, the defense had not produced a single medical  
13 record to the government in this case until their client  
14 brought it up. And their position had always been that they  
15 didn't have any but that they were willing to sign HIPAA  
16 waivers to let us get them.

17 THE COURT: Oh, no. I mean, that's not how this  
18 works. I mean, we exchange documents. I mean, if you want  
19 relief -- I mean, I don't know. This is argument for  
20 parties. I mean, everybody has a different take on it, but I  
21 will just tell you guys the ground rules.

22 If you request relief from the parties based on  
23 medical evidence, then you need to produce all of the medical  
24 records. I mean, that's just the ground rules. So we can't,  
25 we're not going to say, well, you got a HIPAA release, get it

1 yourself. If you're seeking affirmative relief, either side,  
2 based on medical conditions, then you need to produce the  
3 medical records.

4 MR. MAGNANI: Of course, Your Honor. And that's the  
5 way competency disputes are handled throughout this country.  
6 That's the way they're always handled.

7 But not in this case. In this case they  
8 wouldn't give us anything. And so when our doctors did their  
9 exams, they did it without complete medical records. There  
10 are still medical records they're trying to get today. But  
11 we still made the deadline. We still did the exams. We  
12 still met the expert report date.

13 And now he's coming in here -- and again, I  
14 said, it's a game of chicken. He's saying, well, I haven't  
15 done anything. The defendant has been out from his first  
16 hospitalization since June 11th. It's been over six weeks.

17 When our first expert examined him, it was  
18 about six weeks after his last hospitalization. So the  
19 defendant is not entitled to a perfect examination that is  
20 completely beyond reproach, especially when the concern in  
21 this case, like I said, Your Honor, it's just a hypothetical,  
22 it's not actually based on a doctor looking at him and saying  
23 he's not in a position to be evaluated. And so, as our  
24 doctors have said, they can't go opine on this hypothetical  
25 situation. He needs to see a patient.

1                   And so the foundation, there's no foundation on  
2 it. The history with their production has been zero until  
3 their client mentioned that he had bankers boxes of material.  
4 And so I just don't have any confidence that continuing to  
5 negotiate will make a different.

6                   And also, it's sort of too late because, as I  
7 said, Your Honor, if we blow up this date, it's going to hit  
8 this thing potential months. And if that happens the reports  
9 that, the designated expert reports, they just get months and  
10 months more stale. And so there is a real harm in this case  
11 besides just the normal harm of delaying a prosecution on  
12 this issue which, at least according to the designated  
13 experts, is really a non-issue because the guy was running  
14 his multi-billion-dollar company until after he was indicted.

15                  THE COURT: But have you turned over -- I mean, it's  
16 got to be mutual, honestly. I mean, so you guys need to get  
17 together and talk about exchanging all the information.

18                  I mean, I hear, Mr. Varnado, your argument that  
19 you haven't gotten documents from the government, the  
20 government hasn't had documents from you guys, hasn't  
21 produced documents. You need to get together. I mean, this  
22 is a competency hearing. Medical records need to be  
23 exchanged. All medical records need to be exchanged.

24                  And especially if somebody is seeking relief  
25 from the Court based on medical records, I mean, I am not

1 going to do this in the blind. I mean, I need the medical  
2 records to be exchanged, I need expert opinions as to what  
3 those medical records, what's in those medical records with  
4 respect to whether or not a competency hearing should or  
5 should not go forward, and that means all of the records. I  
6 mean, it has to be.

7 MR. MAGNANI: And, Your Honor, I can tell you, we  
8 have given every single medical record that's been created  
9 that's in the government's possession in this case.

10 The discovery motion, as Mr. Varnado mentioned,  
11 is a motion that, number one, it seems pretty clear today  
12 that in referencing the motion today it's really just another  
13 way to bootstrap this request for a continuance by claiming  
14 it didn't happen. But the things they don't have are rough  
15 notes, are notes that the experts, who have all submitted  
16 expert reports, rough notes that they took during recorded,  
17 video recorded sessions with the defendant, so that's one  
18 thing, rough notes of a non-recorded session with the  
19 defendant's attorney.

20 Ms. Keneally and Mr. Romatowski were both  
21 interviewed by one of the designated experts. And we asked  
22 if that could be recorded. The defense said no, it couldn't  
23 be recorded. And so we asked if we could send an agent to  
24 take notes, but they said no. So the designated expert took  
25 notes, and two additional Jones Day attorneys were in the



1 room and they took notes. So they want our expert's notes of  
2 a meeting that they were at but they didn't allowed it to be  
3 recorded. These are the types of trivial requests that  
4 should not delay this hearing.

5 THE COURT: I guess why would the rough notes make  
6 any difference in your expert reports?

7 MR. VARNADO: Well, Your Honor, because the  
8 government and the court-ordered experts relied on these  
9 notes that we don't have. And so under Rule 16, Dr. Darby,  
10 the neurologist, examined the defendant and his wife and  
11 provided those rough notes to Dr. Deeds. Dr. Deeds says he  
12 relies on them. We have never seen them. And we are  
13 entitled to see what the court-appointed experts relied upon  
14 in formulating their reports, because we don't know what  
15 those notes said.

16 And in one instance I think the government  
17 suggests, well, for the notes from Mr. Brockman's wife's  
18 interview, go get them from her lawyer. You can go that  
19 route. And it's really just simple Rule 16. If the expert  
20 relies upon it and it's listed in their report and it seems  
21 they rely upon it and they won't turn it over, we're entitled  
22 to it.

23 And then with respect to, again, the unusual  
24 step of us making counsel available, multiple counsel to the  
25 court-appointed experts and made them available for

1 interviews, but we don't -- and notes were taken by Dr.  
2 Denney and given to Dr. Dietz, we don't know what those notes  
3 say. Although we were present, we don't know what Dr.  
4 Denny's notes said and how Dr. Dietz relied on those. Those  
5 are some pretty fundamental principles that we should be  
6 entitled to.

7 And if I could, I do want to go back to the  
8 government's representation that they received no medical  
9 records is preposterous.

10 THE COURT: I mean, I am taking it that everybody  
11 has their own argument as to what is or is not medical  
12 records. It happens. I mean, it is or is not production  
13 happens in all the cases. One side says we produced a lot.  
14 The other side says you haven't produced anything. It's  
15 usually somewhere in between. It's usually they produced  
16 stuff, but it's not what the other side wants or thinks is  
17 relevant or sufficient, so I get all that. I mean, we don't  
18 need to go there.

19 But can you guys hold on for just one second.  
20 I need to take care of something quickly. I will be right  
21 back.

22

23 (Brief recess taken)

24

25 THE COURT: Okay. We are back on the record in this

1 case.

2 With respect to the request for the extension  
3 of time, I am just going to rule, respectfully, the request  
4 is denied at this time without prejudice to being reasserted.

5 What the parties need to do is, the deadlines  
6 are in effect. You need to exchange, since you are  
7 requesting relief from the Court, you need to make sure all  
8 those medical records are exchanged and you have an expert  
9 report to me stating why these medical procedures are going  
10 to the affect the competency hearing at this point.

11 I don't have anything to work from. I have got  
12 this timeline. Unfortunately the timeline didn't really tell  
13 me anything. I hear you, but it doesn't. As I said, just  
14 because you are under general anesthesia don't mean that you  
15 are not able to take a competency exam. And just because you  
16 were delirious basically two months ago doesn't mean that six  
17 weeks later that you're incompetent and can't take a  
18 competency exam now.

19 I mean, when I had the flue, I had a fever, I  
20 was delirious. Two months later I was perfectly fine. It  
21 didn't affect my competency. So I need the expert reports.

22 So, if you want an extension, you need to  
23 provide the medical records to both sides and then both  
24 sides, you need to provide me with an expert report stating  
25 why a competence exam is not appropriate. I understand this

1 August 6th deadline is coming up. I'm sorry. I am not going  
2 to rule on this until I get that information. Other than  
3 that we are keeping the deadlines in place.

4 MR. VARNADO: Your Honor, could I maybe ask one  
5 request. Given that the sleep study is scheduled for August  
6 12th -- and I think Mr. Magnani indicated the government  
7 would be amenable to this -- leave the hearing date intact  
8 for now until we can get you the information, but push back  
9 the expert report deadline from the 6th to a week after the  
10 sleep study so that that can be incorporated and we can  
11 continue to move forward.

12 We are not trying to drag our feet here, and as  
13 the government had indicated, push that deadline, keep the  
14 hearing date, and we can continue to exchange information and  
15 bring this to the Court's attention.

16 MR. MAGNANI: I think that we would be inclined to  
17 agree, but I would prefer if we could do that offline as an  
18 agreement between the parties after I have had the chance to  
19 talk to the rest of my team.

20 THE COURT: Okay. I think that's reasonable. You  
21 probably want to make sure that everybody is on the same  
22 page and deal with your timing issues as well because I am  
23 sure there is other deadlines that I assume that you're all  
24 working with, I have no idea, with your experts or doctors.  
25 So go right ahead.

1 MR. VARNADO: Judge, just one last thing. Just for  
2 the record, we did file the letter motion for the continuance  
3 just four days after he was released from the hospital for  
4 that surgical procedure.

5 THE COURT: You did file it. And as I said, my  
6 concern, the timing is a minor concern, but it's just a  
7 concern. But my main concern is I don't have the information  
8 that I need to be able to evaluate a request for extension at  
9 this time.

10 MR. VARNADO: We will get that information, Judge.

11 THE COURT: So then the motion to compel, the reply  
12 is due August 3rd. Once I get that reply then I will rule on  
13 the motion to compel. I understand the issues. I understand  
14 the issue about the raw notes. I just want to see what the  
15 reply is now that I have gotten the response.

16 MR. VARNADO: Your Honor, if I could just flag to  
17 you what will be coming in this reply because you may not  
18 have had a chance since it was just done on Tuesday night.  
19 The defense -- I mean, the government had filed their  
20 opposition to that motion to compel. And that is now not  
21 just an issue about have they produced the records, you know,  
22 should we get raw notes? Are there testimony that they have  
23 in their possession?

24 In their opposition to the motion to compel  
25 they essentially conceded that the government has abandoned

1 any notion that the court-appointed experts are mutual  
2 arbiters and fact finders in this case and have said these  
3 are our experts. They're actually an arm of the prosecution  
4 and they are out conducting these examinations.

5           Expect to find in our reply, Judge, a request  
6 for a briefing schedule on how the government has completely  
7 fallen afoul of the statutory regimen here under 18 USC 4241  
8 and 4247 where the experts were designated by the Court and  
9 were intended to be mutual arbiters who would report back to  
10 the Court on their findings concerning the defendant's  
11 competency, and instead that's not at all what happened.

12           In fact, the government concedes in their  
13 opposition that they treated them solely as their experts and  
14 their advocates. They asked for counsel not to be present  
15 when they spent days upon days interviewing our clients. And  
16 we believe that completely falls afoul of the statutory  
17 regime here governing competency hearings. And even the  
18 manner in which the reports were submitted, they were  
19 addressed to Mr. Smith. Mr. Smith then provided them to the  
20 Court as opposed to them being addressed to the Court.

21           That's not just a semantic or logistical  
22 issues. It also goes into the type of questions they were  
23 asking the defendant without the presence of counsel and  
24 whether he would entertain a guilty plea, how strong he  
25 thought the government's case was.

1           The entire -- again, we will respond in the  
2 reply that just came in two days ago, but there are serious  
3 and grave concerns as to how the government has interacted  
4 with and treated the court-appointed experts who are supposed  
5 to remain neutral and simply provide information to the Court  
6 for its consideration concerning competency and instead are  
7 being advocates for what the government is proposing their  
8 concern of defendant. And I just want to flag that for you  
9 because it is coming okay.

10           THE COURT: Okay. I need to hear all that. I mean,  
11 I don't want to get into it now. I understand that you have  
12 a different take on it all, I understand that. But I want to  
13 get the reply brief, and then after I get the reply brief,  
14 all of the briefing will be done and I will take the issue up  
15 then.

16           But I know that you want to be heard on it, you  
17 have got something to say about it, but I don't see any point  
18 in arguing about it when I don't have the reply brief yet.

19           MR. MAGNANI: Well, the government's submissions, of  
20 course, dealt with this issue, so it is mostly briefed from  
21 our perspective.

22           But the two things I just want to say is, one,  
23 Your Honor, of course, from the beginning and in every single  
24 interaction we have ever had with these experts, we told them  
25 to follow the facts, to follow the evidence and to tell us

1 the truth and to tell us whatever happened, and that we don't  
2 have any dog in the fight either way and that they should  
3 just be as objective as possible.

4 And then the second thing is, our conduct in  
5 this case is not only consistent with the cases that we cite  
6 in our memo, but it's also consistent with the experiences of  
7 very experienced federal prosecutors in the death penalty  
8 sections and in competency hearings all the time.

9 It's also consistent with the practice and  
10 experience of two of the government's experts who have been  
11 doing this since before I was born and have done hundreds if  
12 not thousands of competency cases. And so there is  
13 nothing -- the defendant makes a big deal about this, but  
14 there is really nothing there. And not to mention, of  
15 course, that this protocol was one that the defense agreed  
16 to, and the protocol allowed for the United States to  
17 unilaterally select these experts.

18 And then, of course, because the experts can't  
19 just go to the defendant's house and examine him, they have  
20 to be designated by the Court. So when the defense claims  
21 that they are court-appointed experts, of course Your Honor  
22 knows that you did not find these people, you did not appoint  
23 them and pay them but that the statute did require us to get  
24 your blessings, your designation under the statute so they  
25 can do the Court order.



1           THE COURT: I have done this. This is not my first  
2 rodeo. I have done this before in death penalty cases. I  
3 understand how this works.

4           MR. VARNADO: Your Honor, I would just say, this  
5 stage of competency versus death penalty or insanity is one  
6 different, and I don't think the air quotes of designation  
7 are really appropriate. That's a meaningful process that  
8 puts the expert, whether they had a relationship with the  
9 government before or not, they then become mutual arbiters of  
10 the Court.

11           That did not happen here. And if everything  
12 was done aboveboard there should be no problem producing the  
13 government's interactions with those experts, but it's  
14 something that the Court needs to see because we think this  
15 process was botched badly by the government in how they  
16 interacted with these court-appointed -- and I'm not using  
17 air quotes -- experts.

18           THE COURT: I'll wait for the reply brief. And as I  
19 said, I am familiar with the case law. I have done this  
20 before in multiple cases, not just death penalty cases but  
21 also -- I've just done it before. So I will wait for the  
22 briefing and then I will take it up at that time.

23           The next is the motion for pretrial conference  
24 pursuant to the Classified Information Procedures Act. The  
25 government filed its opposition. Defendant has filed a

1 reply. That is now ripe, and I will get an answer back to  
2 you, unless you guys have come to some agreement on this.

3 MR. VARNADO: We have not, Your Honor.

4 THE COURT: Then I will get an answer back to you  
5 shortly.

6 And then next was the government's Rule 17  
7 subpoena submissions. I wanted to find out whether the  
8 parties have gotten any agreement with respect to those  
9 subpoenas.

10 MR. MAGNANI: Well, just importantly, there have  
11 been areas on which the parties have had some agreement for  
12 quite sometime; and so I believe before the Court now are  
13 agreed motions for issuance of Rule 17(c) subpoenas for, I  
14 believe it's two witnesses; but I can double-check that, Your  
15 Honor, so there is some agreement.

16 There is disagreement with respect to, I  
17 believe it's five witnesses, who are people that used to work  
18 with or work for Mr. Brockman. And I think that -- I mean,  
19 that has been fully briefed. It's based -- and my  
20 understanding of the argument is that it's basically whether  
21 or not the government has engaged in a fishing expedition or  
22 whether people that worked with him for years might have  
23 something relevant to say about his mental competency.

24 MR. VARNADO: Your Honor, I would say that issue is  
25 fully briefed, and I would just draw the Court's attention

1 that the defendant has not opposed these Rule 17 subpoenas  
2 when they pertain to medical professionals who are going to  
3 have something to say about his competency. We really bent  
4 over backwards, and they're more than reasonable.

5 But the latest submission is Document No. 71,  
6 to which we responded in Document No. 85, that really calls  
7 out the exact fishing expedition that the government's on.  
8 These aren't for medical professional records, which is how  
9 this whole sequence started. We need Rule 17s so we can get  
10 medical records so our experts can reply upon it. That's out  
11 the window. It's now just these are things we'd like to  
12 have.

13 And in the latest submission, which again, we  
14 call out in our response -- they didn't even file a reply --  
15 they are seeking records from someone like Mr. Brockman's  
16 pastor and seeking records of what donations he might have  
17 made to the church that that pastor was the head of. How  
18 could that possibly be relevant to the defendant's ability to  
19 assist in his own defense at trial?

20 There is other misuses of Rule 17 seeking to  
21 advance their underlying case by looking for records from Art  
22 Chandler. The motion they say is about the defendant's  
23 behavior and interactions at the time; but if you actually  
24 read the subpoena, it's about properties, you know, governed,  
25 owned by Evatt Tamine, one of the cooperators, and other

1 things that can't possibly have a bearing on the competency  
2 hearing.

3 I won't belabor the issue. It's briefed fully.  
4 I would just urge the Court to read Document 85 which we  
5 think this is abuse of the Rule 17 process. We have bent  
6 over backwards and agreed where appropriate on the medical  
7 issues and we fleshed that out, but this is a bridge too far.

8 THE COURT: So I am going to grant the unopposed  
9 motion and then enter an order on that, and then I will enter  
10 an order regarding the others later.

11 And I understand your argument, I have read it.  
12 I understand the government's position on some of these. I  
13 just want to take a look on a couple of them. But my  
14 understanding is the government's position basically is that  
15 these -- well, I understand the position, because if I state  
16 it, then you guys are going to get into argument and you want  
17 to argue it now, and we don't really need to do that. I have  
18 got the briefing.

19 So, anything else that we need to talk about  
20 this morning?

21 MR. VARNADO: Your Honor, maybe two brief items. I  
22 know we have been here a while, but with the Court's  
23 indulgence.

24 THE COURT: Sure.

25 MR. VARNADO: Thank you.

1                   There have been a number of sealed documents  
2 filed on the docket with no explanation. I think we now have  
3 pieced together, at least three of them are the expert  
4 reports that were required to be filed under seal.

5                   And then there is two other items. And I would  
6 just ask that the government be instructed not to file  
7 unidentified sealed documents without explaining to the  
8 defense what they're filing and what it pertains to. At  
9 least there may be a reason that it's sealed and we can't  
10 have access to it, but there are at least two filings that we  
11 either got very belated notice or no notice at all. And I  
12 think even under the Court's procedures just filing something  
13 as a sealed document is not appropriate and certainly in a  
14 criminal case where we have an interest in what's being said  
15 and provided on the document to the Court.

16                  THE COURT: Okay. Well, I have ordered that those  
17 documents be sealed, and they're going to remain sealed.

18                  MR. VARNADO: Okay.

19                         Last issue, Judge, there is a third party  
20 that's filed a motion to strike the indictment. You know,  
21 we'll wait -- I'm sorry -- to strike the apportionment and  
22 surplusage in the indictment. We will wait to see what the  
23 government's response is on that.

24                         But I would note in that third party motion, it  
25 includes an email from one of the government's lead counsel

1 that says, yes, there is an error in this indictment and this  
2 is wrong. And we never received notice of that until this  
3 third party filed that email. And so, as the Court considers  
4 that, that is of concern to us as well that there is errors  
5 in the indictment that are being pointed out to third parties  
6 six months ago but not to us.

7 THE COURT: Anything from the government with  
8 respect to errors in the indictment?

9 MR. MAGNANI: No. I think, as Mr. Varnado has  
10 suggested, it would be best not to get ahead of the briefing  
11 on that one, Your Honor. We'll be filing a response, and I  
12 think at that time Your Honor can consider it.

13 But if I could, I'm not trying to get into  
14 anything, but it's just about the statement about subpoenaing  
15 a pastor. I just want everybody to be clear, this pastor is  
16 on the board of Mr. Brockman's company.

17 THE COURT: Okay.

18 MR. MAGNANI: As long as that's clear to the Court.  
19 This is not the United States trying to pry into a spiritual  
20 relationship between a man and his pastor. This is an  
21 investigation that involves looking at people who are in the  
22 board room when company decisions are being made.

23 THE COURT: And you're trying to -- yes, I get that.  
24 I get that. I know you needed to make that clear on the  
25 record. The Court's reviewed the pleadings. I am satisfied

1 that these subpoenas are not being sought for any  
2 inappropriate purpose.

3 MR. VARNADO: We would argue that if you're using  
4 Rule 17 for impeachment purposes, that is actually  
5 inappropriate under the case law. But we understand the  
6 Court has the briefing.

7 THE COURT: I have got the briefing. If I talk  
8 about it, you guys are going to want to argue, obviously,  
9 which is great; but I don't think I need additional argument  
10 on the issue.

11 Anything else that we need to talk about this  
12 morning?

13 MR. VARNADO: No, Your Honor. Thank you very much.

14 MR. MAGNANI: The only other thing is that the  
15 government did request that, although it seems that no  
16 further evaluation has been done, the government thinks it's  
17 important that if the defense is going to have its own  
18 examiners evaluate the defendant for purposes of the  
19 competency hearing that those evaluations be subject to the  
20 same video recording requirement. So this is something that  
21 I raised with the defense when they called me and asked for  
22 my position on continuance. And I asked them if they would  
23 agree to bring it up at this hearing. They did not.

24 But it seems like this hearing has now taken on  
25 a lot of issues, so I would hope that the Court could

1 consider that as well because I think it would be important  
2 so that everybody from Your Honor to the United States'  
3 experts can look at those evaluations objectively and have a  
4 fair basis of criticism so that we're not seeking notes that  
5 their doctor made during the examination.

6 THE COURT: Okay.

7 Is there anything further we need to talk about  
8 this morning?

9 MR. VARNADO: Not from the defense, Your Honor.  
10 Thank you again.

11 THE COURT: Not a problem.

12 From the prosecution?

13 MR. MAGNANI: No, Your Honor.

14 THE COURT: I appreciate everyone's focus and time.  
15 This status conference made things very easy. If we can keep  
16 doing that in the future before our status conferences, just  
17 provide me, Mr. Varnado, this was perfect. So just provide  
18 me with a status letter. It makes it easier for me to rule  
19 on the issues and get answers back to you guys quickly.

20 And on the issues that I just talked about that  
21 I will rule on, I will get answers back to you shortly.

22 MR. VARNADO: Very well. Thank you, Your Honor.

23 THE COURT: And thanks for your patience this  
24 morning. I know we started a little bit late.

25 MR. MAGNANI: Thank you.



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THE COURT: We will stand in recess.

(Conclusion of proceedings)

## 1 CERTIFICATION

2  
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4  
5 I, Fred Warner, Official Court Reporter for the  
6 United States District Court for the Southern District of  
7 Texas, Houston Division, do hereby certify that the foregoing  
8 pages 1 through 41 are a true and correct transcript of the  
9 proceedings had in the above-styled and numbered cause before  
10 the Honorable GEORGE C. HANKS, JR., United States District  
11 Judge, on the 29th day of July, 2021.

12 WITNESS MY OFFICIAL HAND at my office in Houston,  
13 Harris County, Texas on this the 11th day of August, A.D.,  
14 2021.

15  
16  
17  
18  
19 /s/ Fred Warner  
20 Fred Warner, CSR  
21 Official Court Reporter  
22  
23  
24  
25